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## METHODS OF SELECTING AND RETIRING JUDGES IN A METROPOLITAN DISTRICT.<sup>1</sup>

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Justice is not administered by an executive head planning how a large number of employees shall do clerical work or tend machines. Its ultimate source is in the operation of the mind of the judge upon certain facts presented to him in a judicial investigation. The power of the state to preserve order and settle the rights of parties is subject to be invoked in one way or another, according as the judge's mind reacts and operates. Clearly, therefore, the way in which the minds are selected for this important public duty and the way they are retired are of the first importance to the due administration of justice.

It may be that in some frontier or sparsely settled rural districts where extra-legal government does not exist, judges are in a degree really elected by the people. It may be that in such communities the electorate does actually pick out that one among the lawyers whom it wishes to act as judge.

There may be other communities which are well satisfied with the results obtained by special judicial elections at which the candidates are nominated by petition only and where the ballot is in form non-partisan. An analysis of conditions in such communities will usually show that extra-legal government by politocrats is very weak or non-existent and that the power of selecting and retiring judges really resides in the lawyers subject only to the approval of the electorate.

In a metropolitan district, however, where there is a large population and a governmental plan which reduces the most intelligent inhabitant to an extreme degree of political ignorance as a voter, and the establishment of extra-legal government by politocrats is

<sup>1</sup> This article will appear as chapter xvii in the author's book entitled *Unpopular Government in the United States*. University of Chicago Press. It is printed here by permission.

thus secured and fostered and becomes the real government, the judges, though the electorate regularly votes to install them in office, are not in fact elected at all. They are appointed. The appointing power is lodged with the politocrats of the extra-legal government. These men appoint the nominees. They do it openly and with a certain degree of responsibility under the convention system. They do it less openly and with less responsibility when primaries are held.

If you wish to test the soundness of these conclusions inquire your way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by politocrats.

The judges in a metropolitan district where the extra-legal government rules and where elections for judges are held, are not subject to a recall merely. They are subject to a progressive series of recalls. They are subject to recall by the politocrats who sit upon the governing board of the party organization. These may refuse a nomination at the time of an election. If the judge secures the nomination he may be recalled by a wing of the organization knifing him at the polls. He may be, and frequently is, recalled by reason of an upheaval upon national issues. In the case so rare that it is difficult for one with a considerable experience at the bar in a city like Chicago to remember it, a judge is actually recalled because of popular dissatisfaction with him. If there now be added the recall by popular vote at any time during the judge's term, we shall have presented the politocrats with a continuous hold upon the judge. Their power may at any time be used to initiate recall proceedings against him, and the individual without any real popular following will have but little chance against the tremendous power of a successful political organization. The recall of a judge by popular vote at any time will give a like opportunity to a particular faction of the political organization to attack a judge it does not

want. Such a recall will likewise give to a party which has a chance of sweeping all before it in a national election an opportunity to initiate a recall of some at least of the judges of the opposite political party. Of course, the recall election will also give the electorate at large an opportunity to retire a judge at once in the rare case where there is a real popular uprising against him. It does not take any great degree of intelligence to estimate whether such a recall by popular vote will be of greater advantage to the extra-legal government by politocrats or to the electorate at large.

The plain truth is that in a metropolitan district the selection of judges by some sort of appointing power cannot by any possibility be avoided. The position of a single judge out of as many as thirty and upward in a district containing an electorate of a hundred thousand and over is too hidden and obscure to enable any man who is willing to occupy the place to secure a popular following. The man who has a real hold upon a majority of so numerous an electorate will inevitably be led to a candidacy for governor of the state or senator of the United States, if not indeed for President of the United States. Another obstacle to the actual choice of judges by so numerous an electorate is that the determination of those fit to hold judicial office is unusually difficult. It would be a problem for a single individual who had an extensive personal knowledge of the candidates and had observed them closely for a considerable period in the practice of their profession. For all but the most exceptional judge in a metropolitan district the power which places him in office and retires him from office will be an appointing power, although there be in force the so-called popular election of judges. So long as extra-legal government by politocrats is the real government, that appointing power will be lodged in the politocrats who wield the power of that government.

There are many who sincerely believe that the ideal functioning of the electorate in a metropolitan district where the extra-legal government is strong may be restored if judges are elected only at special elections, where a judicial ballot is used which omits all designation of parties and upon which the names of candidates are placed by petition only, and the name of each candidate is rotated upon the ballot so that it will appear an equal number of times in every position. The object of such legislation is to restore a choice by the electorate by depriving the extra-legal government of its

predominant influence in judicial elections. The means adopted to deprive the extra-legal government of its influence is to take from it the use of the party circle and the party column. It may safely be predicted of such legislation that it will not cause judges to be the actual choice of the electorate, nor will it eliminate the influence of the politocrats in judicial elections.

The supposition is that if the influence of the politocrats can be eliminated the electorate will necessarily make a real choice. But the electorate does not fail to choose simply because the politocrat has taken that choice from it. On the contrary the politocrat rules because the electorate regularly goes to the polls too ignorant politically to make a choice of judges. That ignorance is due to the fact that the office of judge is inconspicuous and the determination of who are qualified for the office is unusually difficult even when an expert in possession of all the facts makes the choice. The proposed method of election does not in the least promise to eliminate the fundamental difficulty of the political ignorance of the electorate. If, therefore, it succeeded in eliminating the influence of the extra-legal government the question would still remain: who would select and retire the judges? There is no reason to believe that the electorate would make any real choice. Electors would be just as politically ignorant as they were before. They would be just as little fitted for making a choice as they were before. The elimination of extra-legal government does not give to the electorate at large the knowledge required to vote intelligently. Who, then, will select and retire the judges? The newspapers might have a larger influence, but they would probably be very far from exercising a controlling influence or uniting in such a way as to advise and direct the majority of the voters out of an electorate of several hundred thousand how to vote for a large number of judges. Special cliques would each be too small to control a choice and combinations would be too difficult to make. The basis of choice would, therefore, be utterly chaotic. There could be neither responsibility nor intelligence in the selection of judges. The results reached would depend upon chance or upon irresponsible and temporary combinations. With every lawyer allowed to put up his name by petition and chance largely governing the result, the prospect is hardly encouraging.

There is no reason to believe, however, that any such disorgan-

ized method of choice would be tolerated. The most potent single power in elections would end it. That power would be the extra-legal government. Its organization would be put to greater trouble in advising and directing the politically ignorant how to vote, because it would have been deprived of the party circle and party column. But the advice and direction could and would be given and followed. Each competitor for the power of the successful extra-legal government would have its slate of candidates. Each would prepare separate printed lists of its slate to be distributed at the polls and the voters would for the most part, as now, take the list of that organization he was loyal to or feared the most, and vote the names upon it no matter where they appeared upon the ballot. Thus the appointment and retirement of judges by the extra-legal government would, after perhaps a period of chaos and readjustment, again appear. Perhaps it would be even stronger as a result of reaction and deliverance from the chaotic conditions which it relieved.

It is impossible to escape the conclusion that in a metropolitan district with one hundred thousand voters and upward, the selection of judges by the electorate is practically impossible. It is equally certain that the judges in such a community must be selected by some appointing power. The real and only question is: what is the best method of appointment?

No method could be worse than that which we now employ. Appointment by the politocrats of the extra-legal government is so obscure, especially when effected by primaries, that they are under no responsibility whatever in naming judges and they have no interest whatever in the due administration of justice. Indeed, the situation is worse than that, for they may have positive reasons for wishing a type of man from whom they may expect certain courses of action which will actually be inimical to the efficient administration of justice, particularly in criminal causes; or they may be interested in filling judicial offices with those who have done more in the way of faithful service to the organization than in the way of practice in the courts.

From time to time, therefore, suggestions have come from members of the bar of ways and means for reducing the influence of the appointing power of the politocrats. It has been suggested that the bar association should be given power to place upon the official

ballot a bar association ticket upon which might appear candidates who had been nominated by any of the other political parties. This would give the candidates approved by the bar association and also by any other political party considerable advantage over those appearing in only one-party column. To that extent it would throw a greater influence into the hands of the lawyers. The question, however, has arisen whether this would result in a greater power in an unbiased bar association to select good judges, or in the lining up of lawyers in groups which were controlled by the leaders of the politocrats. The effort is frequently made to provide that all judges shall be elected at a special judicial election. This course may prevent the recall of judges because of an upheaval on national issues. It does not, however, interfere with the appointment of a nomination by the politocrats in the first instance. Even when the nominations are all by petition and the party circle eliminated and the names of candidates rotated upon the ballot, resort must still be had to the extra-legal government to escape absolute chaos and selection by mere chance.

Nothing of great value can be accomplished until it is recognized that the judges in a metropolitan district are certain to be appointed and that the only proper appointing power is one which is conspicuous, legal, subject directly to the electorate, and interested in and responsible for the due administration of justice.

This principle may be worked out in a variety of ways.

When the state executive as now constituted is given power to appoint directly, or to appoint indirectly by designating the nominees to be voted upon, the principle is worked out in one way. There are, no doubt, serious objections to either method of executive appointment. The governor of the state is, of course, in the midst of politics. He is also in the midst of a legislative program and the temptation is very strong to trade judicial places for the progress of administration measures in the legislature. Then the governor is not particularly responsible for the administration of justice, that being a matter of the judicial department rather than the executive. But this much can be affirmed, that any mode of appointment by the governor, since it is conspicuous and legal, and since the governor is directly subject to the electorate, carries with it a measure of responsibility which is not found where the appointment is secret and by the politocrats of the extra-legal government. Appointment

by the governor is better than the present misnamed plan of popular election.

It might be suggested that the power of appointment could be lodged in the highest appellate tribunal of the state, the members of which had a term of considerable length, but were subject to election. This again is, no doubt, open to objections. But again, it could not possibly be a worse method than the one now employed. Judges of such courts are more easily than governors made responsible for the due administration of justice. They would have stronger motives than the governor for appointing men who could best carry on the administration of justice. No body of men in the state has a better opportunity for determining the character and ability of lawyers, since they examine the work of lawyers continually with most minute care.

It has been suggested that vacancies in the judiciary should be filled by the appointment of the chief justice of the metropolitan district. He in turn should be chosen by the electorate of the district at fairly frequent intervals—viz., every four or six years—and in him should be vested large powers to oversee and direct the mode of organizing and handling the business of the court.<sup>2</sup>

<sup>2</sup> The following extract from the letter of Mr. Charles H. Hartshorne, of Jersey City, N. J., to the author dated November 4, 1912, explains the plan of administering the chancery jurisdiction in New Jersey: "The constitution of New Jersey provides that 'The court of chancery shall consist of a chancellor.' The chancellor is appointed by the governor with the approval of the senate, for a term of seven years. He is usually reappointed, though it is an open question whether this office is an exception to the custom that judicial officers of the superior courts shall be reappointed, regardless of their political affiliations, so long as they are capable of giving efficient service. That custom has resulted in our having upon the bench of the higher courts, judges who have served for very long periods—twenty-five years and upwards.

"A number of years ago, the work of the court of chancery having become too great for one judge to dispose of, a statute authorized the appointment by the chancellor alone (without confirmation by any other authority) of a vice-chancellor, as assistant. By further statutes, the number of these was increased to seven. The court now consists of a chancellor and seven vice-chancellors, who sit separately in different parts of the state. The vice-chancellors are appointed for seven-year terms. That bench is generally regarded as the strongest in the state and has given entire satisfaction to the bar and to the public.

"The vice-chancellors hear interlocutory motions in nearly all cases under a standing rule of the court, but they conduct trials and final hearings only



The objection which will at once be raised to this is that it presents an opportunity for the politocrats to obtain vast power by securing control of the chief justice. It is not difficult to demonstrate that the lodging of the appointing power in the hands of a responsible and conspicuous chief justice controlled by the politocrats would be much less inimical to the administration of justice than the appointment of judges in secret and without responsibility by the politocrats directly. The chief justice would, of course, only fill vacancies occurring during his short term. The guarantee to the public that such vacancies would be filled with fairly efficient men lies in the fact that enormous responsibility for the due administration of justice is focused upon a single man. Every complaint of inefficiency and impropriety comes home to him. Such a man cannot carry on the work of the court without the most efficient judges that he can possibly secure. This leads necessarily to the procuring as judges of members of the bar who have, in a successful practice in the courts, had a proper service test. Assuming that such a chief justice were the recognized deputy of the politocrats he would be driven by the necessities of the case, by the conspicuousness of his position, and the force of public opinion, to do his utmost to persuade the politocrats to permit him to appoint efficient men. That would produce an appointing power far better than the secret and utterly irresponsible method of direct appointment by the politocrats, which now exists. A much more desirable result than this, however, is to be expected. Such a chief justice would be so important and conspicuous an officer and his power so great, that in his nomination and election the desires of the electorate as a whole

upon an order of reference from the chancellor. After trial they write the opinion of the court, which is usually reported, and advise the decree, which is then signed by the chancellor. No appeal lies from their decree to the chancellor, but all such decrees may be appealed directly to the court of errors and appeals.

"Theoretically, the vice-chancellors are merely referees who report and advise the chancellor, the decree being made by him upon their report. In actual practice however, they are members of the court of chancery, in fact (but not in form) making the final decree of that court.

"The system has worked very satisfactorily in respect to the character and attainments of the members of that bench, but the work of the court in populous cities is a good deal in arrear. This is due to the volume of business having outgrown the number of vice-chancellors."

would have to be much more fully considered than is the case where the politocrats appoint to a nomination and seek the election of an obscure member of a bench composed of thirty members and upward.

All fear of the chief justice having too much power and falling too much under the influence of the politocrats and extra-legal government may be dissipated by making adequate provision for his retirement. The chief justice would, of course, be subject to impeachment. He might also be retired by a legislative recall by a vote of three-fourths of the members of the legislature after an opportunity for defense and for cause entered upon the journals,<sup>3</sup> or by the governor upon an address of both houses of the legislature.<sup>4</sup> The fact that the chief justice held office only for a short term would in fact subject him to a recall by popular vote at the end of each period. To this might, with perfect propriety, be added the recall of the chief justice and election of his successor by popular vote during the regular term. Surely such safeguards are ample to protect the electorate from any abuse of the appointing power conferred upon the chief justice.

A chief justice who is retired at the end of his term by failure to be reelected should, however, have the right, if he so chooses, to remain one of the judges of the court upon the same footing as an appointed judge and subject to assignment to duty by his successor. This is proper because the election goes only to the matter of his political position as the chief justice exercising an appointing power and administrative powers with respect to the organization of the court and the way its business is handled. The electorate has nothing to do with his fitness to decide litigated causes. Furthermore, the fact that a failure to be reelected will not send the chief justice back to the practice of the law, which he has given up, will insure greater independence on his part while holding office as chief justice. It will also be an act of fairness to him, since a profession once given up during six or eight years for a place upon the bench is difficult and frequently impossible to recover. In addition to this it is best for the administration of justice itself that ex-chief justices who cannot regain their position in practice and are pitiful reminders of former greatness, should not be left derelicts at the bar. But if

<sup>3</sup> Illinois constitution 1870, art. vi, sec. 30.

<sup>4</sup> Massachusetts constitution, ch. iii, art. 1; 38 and 39 Vict. ch. 77 (Jud. Act 1875), sec. 5.

a chief justice upon failure to be reëlected chooses to take his place as a judge in the court, he should not be permitted again to be a candidate for chief justice. It will not do to have in the court the rival of the sitting chief justice with a motive for making trouble.

The principal objections to the appointment of judges have been that they necessarily hold for life and become arbitrary and exercise judicial power in a manner distasteful to the lawyers, their clients and a majority of the electorate. It will usually be found on analysis that the objectionable exercise of judicial power by an appointed judge is due to the fact that appointment means a life tenure. Hence the real objection to the appointment of judges as such is that when appointed they have held office for life. The entire objection, therefore, to appointment may be met by limiting the tenure of the appointed judge and by a variety of provisions for his retirement. He would, of course, be subject to impeachment. He might very well in addition be subject to some mode of legislative recall such as was proposed for the chief justice. His term may be limited to five years or seven years, thus requiring a retirement at the end of each period unless a reappointment is made. The judge appointed by the chief justice may even be subject to recall by popular vote according to one or the other, or both, of two plans. The appointment might be for a probationary period—say three years—at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period his appointment should continue for—let us say—six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant. If thought necessary further to protect the electorate from the bogey of an appointed judge, he might be subject to recall at any time upon the petition of a percentage of the electorate. But this recall, like the other, should be only upon the question of whether the judge's place should be declared vacant, leaving the vacancy, if created, to be filled by the appointing power. The danger in the existence of both these plans of popular recall is that they may be used with more effect by any extra-legal govern-

ment of politocrats than by the electorate at large. It is highly improbable that the electorate would find it necessary or advisable to use either mode of recall. The presence of either mode would, therefore, furnish a means whereby an influence of the politocrats upon the judiciary could be continuously maintained.

It is, however, a grave mistake to suppose that judges exercise their judicial power in a distasteful and arbitrary manner merely because they hold for life or during good behavior. An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority and to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence. When a considerable number of judges in a metropolitan district are provided with a chief justice and organized for the efficient handling of a great volume of business, the means of securing the exercise of a corrective influence over their conduct at once appears. Such a court must be organized into divisions for the purpose of handling specialized classes of litigation. In a metropolitan district like Chicago there should be an appellate division with from six to nine judges sitting in groups of three, a chancery division of six judges with a corps of masters, a probate and family relations division with at least four judges and a corps of masters and assistants, a common law division with fifteen to eighteen judges and a corps of masters, a municipal-court division with thirty-three judges. The chief justice should be the presiding justice of the appellate division and each of the other divisions should have a presiding justice with large powers over the way in which the work of each division is handled. The chief justice and the presiding justices of divisions should form a judicial council or executive committee, with considerable powers over the way the court as a whole was run. To such a judicial council there should be committed the power to remove from office any judge, other than the chief justice, and to reprove, either privately or publicly, or transfer any such judge to some other division of the court for inefficiency, incompetency, neglect of duty, lack of judicial temperament, or conduct unbecoming a gentleman

and a judge, for the good of the service, or to promote its efficiency. The power of removal by the council should only be exercised where written charges had been filed and after an opportunity has been given to the judge to be heard in his own defense.

The existence of a judicial council composed of the chief justice and the presiding justices of the different divisions of the court, each one responsible for the way in which the work of his division is handled, suggests also a practicable way in which to stimulate efficiency at the bar, provide a service test for candidates for places on the bench, and subject the appointing power of the chief justice to a slight but reasonable control. The judicial council should be given power to appoint upon an eligible list for each division of the court twice as many members of the bar as there are judges in the division. The chief justice in appointing judges to a place in any division of the court should be required to select from this eligible list on the occasion of every other appointment at least. The operation of such a plan would be to place in the hands of the presiding judges of divisions an express authority to suggest what members of the bar practicing before their divisions respectively would make satisfactory judges for each division. It would also operate to stimulate the efforts of lawyers and promote competition to secure places upon such eligible lists by specialization in practice before particular divisions. This would develop an expertness in the handling of litigation which does not now exist on the part of any considerable number of the bar.

We may then conclude that in a metropolitan district with a hundred thousand electors and upward judges cannot be elected. They must be appointed. If an election is attempted it is a failure and appointment results. The worst method of appointment is the secret and irresponsible appointment by politicians. The most promising is the conspicuous and legal appointment by a chief justice elected at large in the district at frequent intervals. Every objection to such a plan and every prejudice against it may be met by provisions for the retirement of the chief justice and his appointees by impeachment, by legislative and popular recalls and by the power of the judicial council to discipline and remove any judge other than the chief justice. It is even possible under such a plan to promote efficiency by securing an eligible list of men whose experience in practice under the eyes of the judges insures excellence in appointment.